85-1808

Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THORNTON DAVIS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Eighth District Court Of Appeals
For Cuyahoga County, Ohio

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451

QUESTIONS PRESENTED

I

Whether due process is violated when, despite defense objections, the Court admits in defiance of the accused's right of confrontation and the hearsay rule, evidence which provides the only corroboration for the testimony of the person making the criminal accusations.

II

Whether evidence is sufficient to support a criminal conviction when it fails to provide a reasonable basis for a finding of guilt beyond a reasonable doubt.

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STATE OF OHIO,

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PETITION FOR WRIT OF CERTIORARI
To The Eighth District Court Of Appeals
For Cuyahoga County, Ohio

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Thornton Davis, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on March 5, 1986, when on that same date the Supreme Court of Ohio denied further appellate review.

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

(1) Sixth Amendment, United States Constitution;

(2) Fourteenth Amendment, United States Constitution;

(3) Revised Code of Ohio, §2911.02.

OPINIONS BELOW

The judgment entry by the Supreme Court of Ohio denying further review is set forth at Appendix "A" in the Appendix to this Petition, at page A - 1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "B", at page A -3.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on March 5, 1986. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

STATEMENT OF THE CASE [1]

Thornton Davis, the petitioner herein, was convicted along with one Frederick Seales, who was jointly indicted, for Robbery pursuant to R.C. of Ohio, §2911.02. He was also convicted for two aggravating specifications. On appeal his conviction was affirmed.

During the trial of this case the first witness was the police officer who responded to a call that sent him to the Taste of Honey Lounge on Harvard Avenue (R 28-29), where ultimately he had a conversation with the alleged robbery victim.

Here the Record shows the trial judge allowed this officer to literally parrot, over the defense objections, the following narration by Presley of what supposedly happened:

> A. Mr. Presley informed me that he had been drinking in the Taste of Honey Lounge with an acquaintance of his, Mr. Seales.

1/ References to the transcript of proceedings will be designated by the prefix "R".

He informed me that at one point during the conversation, another male, who appeared to be an acquaintance of Mr. Seales also sat down with him at the bar and a conversation, a casual conversation took place.

He informed me after a short period of time, that he left the bar, at which time he had several pieces of merchandise in his possession, which included a clock that he had just purchased at a novelty store and he had light bulbs for some of the lamps inside of his house, and a couple of record albums that he had purchased at the neighboring record store.

He advised me that he walked to an area directly east of the lounge where he was approached by Mr. Seales and his acquaintance, later identified as Thornton Davis.

He advised me at some point after he was approached, he was

> struck by a fist from Mr. Davis, knocked down to the ground and his merchandise and property scattered about the ground.
>
> He didn't attempt to resist what was taking place.
>
> He advised me that all of his property was taken by both males, and they departed the scene.
>
> He told me that he was able to look at the vehicle they were driving in when they departed, and described it as a white car with four doors and a partial license number which he was able to obtain the letters, Q, as in queen, K as in king, and D as in David, and two numbers from the license plate. (R 31-32).

Willie Presley, the alleged robbery victim, who was said by the officer to have been in a state of intoxication and highly agitated at the time (R 47), admitted he had been drinking in the bar with the defendant Seales and the petitioner, Davis (R 67). Seales he

knew, Davis he did not (R 67). They had talked for a while before Seales and Davis left the bar (R 68). Presley says he continued drinking before leaving the bar about ten minutes after the others had left (R 69).

Presley testified that once outside Davis accosted him and asked for a $10 loan before suddenly knocking him down (R 69). Next, he noticed his money was on the ground as were his albums (R 69). After this incident he went back in the bar to call the police but was unable to do so because someone was on the phone (R 71), so he went back outside. Supposedly Presley went to another bar looking for a phone to no avail (ibid) and then he went back to the first bar (R 71). When he left this first bar again Davis and Seales, according to him, were still in Seales' car (R 72). Davis, he says, jumped out of the car and stated "you still didn't get enough" (R 72). Presley claims he asked to be let alone and then went home and called the police (R 72).

As to the money supposedly lost in the robbery, this witness testified that

it was on the ground after he got knocked down and he saw our petitioner picking it up (R 76).

On cross-examination Presley repeated that he was knocked down and his money ended up on the ground (R 87). And, it was said that when he got up he immediately went into the bar to call the police (R 88). Only one blow supposedly was struck (R 94).

II

Seales, whose evidence showed he worked two jobs and certainly did not need to rob anyone, had run into Presley whom he knew in the bar. (R 133.) Presley, who had a bag with him, sat down near where Seales was sitting. The bag was put in the seat between them (R 133). Seales stated a point was reached when he asked Presley to take a ride with him over to see a photographer friend of his (R 134). When it turned out the friend he went to see was not home, they returned to the bar (R 134). Shortly afterwards Davis came in and joined them.

Seales next testified that in the midst of all their drinking, Presley started making (what can only be interpreted as homosexual) advances

toward him (R 138). Specifically, Presley kept putting his hands on Seales, who told him he "didn't want none of that" (R 139). When Presley persisted, Seales and Davis left the bar. Seales testified he intended to take Davis to the barber shop, which was Davis' destination all the time (R 139).

Seales then testified Presley had evidently followed them out of the bar, because all of a sudden he was right behind them. Presley, according to Seales, again put his hand on him "and tried to turn me around, and wanted to talk" (R 142). They got into a wrestling match, which Thornton Davis broke up. Thornton then said "come on take me to the barber shop". It was after that that the police stopped them (R 144). It may be significant here to note that Presley never saw any money strewn over the ground and never saw Davis picking up any money (R 145).

Based on this evidence the jury convicted both defendants.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

This case should be reviewed for a whole host of reasons. Not the least of

these would be to advise Ohio's trial judges and prosecutors that despite the popularity of the harmless error doctrine, there are limits beyond which this doctrine cannot be stretched. Indeed, when a reviewing court is not convinced errors in judgment that led to the jury's consideration of inadmissible evidence are excusable, they should simply not allow such errors to be routinely regarded as harmless.

ARGUMENT NO. I

Due Process Is Violated When, Despite Defense Objections, The Court Admits In Defiance Of The Accused's Right Of Confrontation And The Hearsay Rule, Evidence Which Provides The Only Corroboration For The Testimony Of The Accusor.

The admission of the devastating segments of the testimony (set forth above, ante, pp. 3 - 5) cannot possibly be defended in law, logic or commonsense. Indeed, the State's argument in the Court below that the evidence was admissible under 801 (d) (1) (C) shows more than a mere lack of comprehension of a very basic concept, it shows a degree of callousness that is really almost incredible.

Here, of course, we now have the benefit of the position taken by the Appellate Court, which was that the assailed evidence had been properly objected to and should not have been admitted. Despite this valid holding, however, the Court then proceeded to spoil its Opinion by proclaiming the jury's consideration of this evidence was harmless error. And, the Court oraculated this was so beyond a reasonable doubt. (See Appendix "B", infra, p. A 11.)

In addressing the ultimate resolution of this issue by the Court of Appeals, hopefully this Court will fully credit certain specific arguments that were made to, and rejected by, that Court. Here the Record shows counsel emphatically argued that placing before the jury the idea, suggestion or even the facts conveyed in Presley's version (as originally told by him to the police) could very well have substantially influenced the determination of the jury as to the believability of Presley's trial testimony -- the critical accusatory segments. Since the jury's exposure to this testimony not only

violated the confrontation rights of the accused, but the hearsay rule as well, the impact of this error can never be meaningfully assessed.

Stated another way, any argument that even without the assailed evidence and inconsistent testimony of Presley alone was sufficient to elevate itself to the status of proof beyond a reasonable doubt would be flawed beyond belief. This follows because anyone reading this Record with the improper evidence included is left with a reasonable doubt as to the guilt of the defendant. This conclusion thus can only be magnified once the Record is read with the assailed evidence excluded, which demonstrates beyond cavil that the appellant was indeed victimized by the admission of this evidence.

Dealing specifically with the statements to which the above arguments are addressed, the contention that they were hearsay under Rule 801 (c), Ohio Rules of Evidence seems clear enough. Since the evidence being referred to was admitted over defense objections (R 31) as proof of the matters asserted in the

statements objected to, no other conclusion is even possible.

Now it is very probable that counsel may argue that the testimony was admissible under Rule 801 (d) (1) (B), since it was consistent with the trial testimony of the declarant. Hopefully this argument will be made, for it will expose two facets of the problem under which defense lawyers routinely labor in this jurisdiction. One, if the evidence was indeed proffered as limited purpose evidence then that statement should have been made when the evidence was proffered, which would require the trial judge under Rule 105 to appropriately limit the evidence to such limited purpose. And, two, if the evidence was offered as a prior consistent statement, within the ambit of Rule 801 (d) (1) (B), then it should have been rejected by still other formidable reasons. Not the least of these is the lack of any proof that the testimony of Presley was challenged as a recent fabrication. And, just as surely, because it was introduced as substantive proof there is no way it can be logically tortured into rehabilitative evidence.

Again, the evidence here being centralized was not "offerred to rebut an express or implied charge ... of a recent fabrication or improper influence or motive." This being so it must be viewed as having been admitted in violation of the Hearsay Rule and the right of confrontation as well.

Our position in this regard is fully supported by that which resolved the precise issue in United States v. Quinto, 582 F.2d 224 (1978).

This brings us then to the reasons why this cause deserves to be review by this Court. First of all this case, like so many other that this counsel has argued to the Ohio Court of Appeals, provides cogent proof of our Appellate Court's penchant for fully crediting a defense contention that the trial judge and the prosecutor were dead wrong in certain critical positions taken by them at the trial and then giving them absolution be declaring the resulting flaws harmless. The fact that the prosecutor even sought to defend the trial court's approval of his own ill-advised tactics (in the Court of Appeals) as a correct ruling should

really have stirred our court to stop what appears to have been developed into an offensive tactic in our prosecutor's arsenal that can be relied on in a pinch.

Of course, we certainly challenge the propriety of any Court resolving itself into an appellate jury and making a substitute finding of guilt. This, of course, is what our Court of Appeals did despite the absolute right of an accused to have a jury decide that fact, as distinguished from having a judge or judges do so. Thus, we contend here that the Court of Appeals after finding the petitioner's confrontation rights were violated by the admission of evidence that also violated the Hearsay Rule, was wrong in arrogating to itself the power to enter it's own verdict on the basis of what it perceived as sufficient evidence to overcome the serious faults that occurred during this trial.

Simply put, our Court of Appeals seems to be saying that due process is satisfied regardless of the fact that the trial judge and the trial prosecutor should have known better (-- and there really is no possible explanation for their not knowing the elementary

principles here involved). Indeed, according to our Court, it is perfectly alright that the accused, the person wronged and victimized, must grin and bear the risk that he may have also been prejudiced by the trial judge and the prosecutor's lack of knowledge of the very basic and elementary rules that were violated.

All this magnifies the contention that (given the frequency with which this harmless error syndrome is now being relied on even by veteran prosecutor's and is being built into excuses for what may very well be designed to camouflage intentional conduct) the patently passive attitude of our Court of Appeals toward these repeated offenses should be deemed intolerable. For indeed, if their view that an accused's right to a fair trial need only be respected in those cases where they deem the question as to guilt or innocence to be close, then it can truly be said that our appellate courts are being correctly dubbed the courts of affirmance.

Hopefully then this Court will view the petitioner's case as an apt case to

declare that a meaningful appellate review even in State court's means far more than an effort by a convicted person to prove that the errors committed were not harmless.

To emphasize the point being made, the position of our Court of Appeals that our petitioner was not prejudiced, by proof that "falls squarely within the ... definition of hearsay ... [and was indeed] offered to prove the truth of the matter asserted, i.e. appellant and Seales robbed Presley" (Appendix "B", p. A 11), is one that simply cannot be defended or validated. Yet we are being told this is alright because "... [our petitioner] had the opportunity to determine if there were any discrepencies between Presley's [the Hearsay declarant's] account to Officer Kalavsky and Presley's testimony at trial" (ibid).

Thus, it should suffice here to note that although Ohio's evidence rules, not unlike the comparable federal rules, allow the accused at his option to show that a witness had made a prior inconsistent statement (not falling within the scope of Rule 801 [d] [1] [A]) they only allow for the admission of

prior consistent statements when there is the claim that the trial testimony was a recent fabrication these rules can easily circumvent. And, that where the resulting effect shows their violation furnished the accused an opportunity to show the two versions were inconsistent it can be said he was not wronged or otherwise victimized.

The real trouble with all this is that such obviously was not the thinking of the rule makers. For it can be assumed they doubtless understood the confrontation and hearsay concepts involved. By way of contrast, the position taken by the Court of Appeals, the trial judge and the prosecutor show they lacked such understanding. If not that, it can safely be said they, either, failed to demonstrate they understood the sophisticated concepts involved, or they simply felt they could be ignored with impunity.

Also relevant here is the fact that prior consistent statements, when admissible, are regarded as substantive proof, Rule 801 (d) (1) (B), Ohio Rules of Evidence. And, proof of any prior

inconsistent statements in the context of this case would have only had a credibility and impeachment use. This is so whether the credibility toward the impeaching proof was directed had been that of the delcarant (Presley), Rule 801 (d) (1) (B) Ohio Rules of Evidence, or the witness (Officer Kalavsky), Rule 806, Ohio Rules of Evidence.

ARGUMENT NO. II

Evidence Is Not Sufficient To Support A Criminal Conviction When It Fails To Support A Finding Of Guilt Beyond A Reasonable Doubt.

The contention is here being made that the due process standard for the sufficiency of the evidence to convict is simply not satisfied by the judge's instructions to the jury to use the standard of proof beyond a reasonable doubt during its deliberations. Indeed, the controlling standards require, both, the trial judge and the reviewing court to police the jury's administration of these standards. The point that was well

made in this connection in Jackson v. Virginia, 443 U.S. 307 (1979), was the cogent observation by Justice Stewart that the courts have a constitutional duty or responsibility to insure that the jury operates with the sufficiency parameter established in the case of In Re Winship, 397 U.S. 358 (1970).

Under this standard, and we contend that this rule must be invoked here, where it is found that upon the record of the evidence produced no rational trier of fact could have found guilt beyond a reasonable doubt (Jackson, 443 U.S. at 324) the evidence is insufficient. See also, Pilon v. Bordenkircher, 444 U.S. 1 (1979).

Since any other reading of Jackson would truly be too illiberal to survive meaningful scrutiny, any conclusion that the evidence in this Record provided adequate certitude to banish all reasonable doubt would really be farfetched. In our view, such doubt as would be sufficiently reasonable to preclude the ratification of this conviction flows very readily from any meaningful assessment of the alleged victims evidence.

Here, of course, once we get past the flat contradiction within the testimony itself, and we put to the side the substantive conflict that emerges when his evidence is juxtaposed with that of Seales, what emerges is the convoluted tale of woe outlined above.

Since there was no corroboration from any other witness, or person, that the event as outlined by Presley occurred, two possibilities, at least, emerge as valid assessments of the probative value of his story. One, it could have happened that Davis did hit Presley, but his act in doing so was unrelated to any intent to rob. And, two, even if, and with, Presley's bag containing the albums and his clock being found in Seales' car, what happened here was this drunk simply left them when he was in the car earlier.

This latter version is bolstered by the lack of any proof that the money supposedly taken was found with the defendants who were arrested within minutes. Also, there was no testimony by, either, Presley or the police officer as to any indications of abrasions or soiled, or damaged, clothing that would

suggest this man had been knocked to the ground or was ever on the ground.

This analysis of the State's evidence becomes even more compelling in the fact of the officer's testimony that although he was on the scene within minutes (R 46) and talked with Presley, the officer did not even bother to go into the Bar in quest of any substantiation of what Presley was telling him at the time (R 43-44). Also, and equally important, this officer (who was the only person other than Presley and Seales to testify) admitted he made no written report whatsoever (R 50). Indeed, he concedes to testifying on the basis of some other officer's report (R 50).

Of no mean importance, this officer did deny that Presley ever reported having lost <u>any</u> cash to these men (R 50).

When one factors into the required analysis Seales' testimony (as summarized above), which showed he and Presley were together earlier, the bag containing the records and the clock could very well have been left in the car as Seales' evidence tends to show. The fact that

Seales was also drunk (R 46) contributes to the conclusion that something other than an intentional robbery motivated anything that may have occurred to Presley.

So long as the burden of proof is upon the State to not only remove the presumption of innocence, but to establish the guilt of the accused beyond a reasonable doubt, a mere scintilla or even some proof is simply not sufficient to warrant submission of the case to the jury. There is simply no other way to read Jackson v. Virginia.

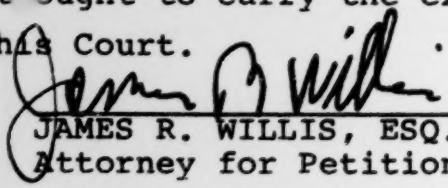
In this case only selected segments of the testimony of Presley even tend to make for proof of any crime. And, his testimony is immersed in hopeless contradictions. Indeed, even if it is true, as Presley says, that the single blow he received to the head caused his money to end up on the ground where he left it (a reasonable inference, since he did not testify to being prevented from picking it up), then the taking of the money would not be a robbery. On the other hand, this logic also supports the conclusion that Presley simply failed to

provide proof sufficient to support any finding of guilt beyond a reasonable doubt.

CONCLUSION

We respectfully submit that the attitude of the prosecutor and the trial Judge, which is reflected in the decision made by them to allow the jury to convict this petitioner on the basis of flagrantly inadmissible evidence is, of course, unfortunate. However, the penchant of our Court of Appeals for resolving itself into an appellate jury and reasoning on the basis of their own assessments of the evidence that justice was done in spite of the easily preventable flaws makes for a situation that really ought to be investigated by this Court.

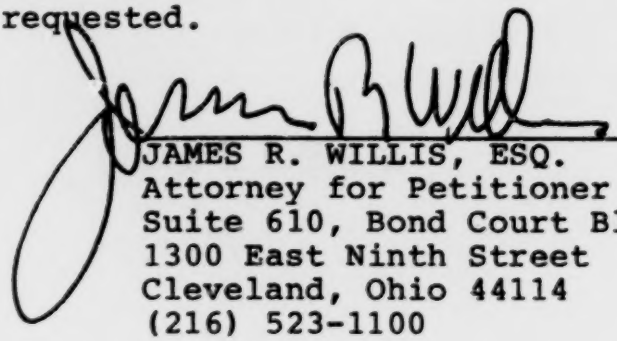
Indeed, if as our court obviously believes, there are no errors that cannot be deemed harmless regardless of where the blame lies, then really this is something that ought to carry the express approval of this Court.



JAMES R. WILLIS, ESQ.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ Of Certiorari was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 14 day of May, 1986, by certified mail, return receipt requested.



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APPENDIX

THE SUPREME COURT OF OHIO

COLUMBUS

1986 TERM

To wit: March 5, 1986

State of Ohio, :
Appellee, : Case No. 86-0016

v. : E N T R Y

Thornton Davis, :
Appellant. :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by James R. Willis.

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY CLERK

SAM F. ADKINS DEPUTY

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 49553

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	AND
-vs-	:	OPINION
	:	
THORNTON DAVIS	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: OCTOBER 31, 1985

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court - Case No. CR. 192325.

JUDGMENT: Affirm.

DATE OF JOURNALIZATION: _____

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KRUPANSKY, J.:

Appellant, Thornton Davis, and his co-defendant, Frederick Seals, were jointly indicted for robbery pursuant to R.C. 2911.02 on August 21, 1984. Davis was indicted for robbery along with two aggravated felony specifications, viz., a previous conviction for robbery in violation of R.C. 2911.02 and a previous conviction for aggravated burglary in violation of R.C. 2911.11. Both Davis and Seals plead not guilty to the crime charged. They were tried jointly by a jury; trial commenced October 31, 1984. The jury found Davis and Seals each guilty of robbery as charged in the indictment. The jury also found Davis guilty of the two specifications. The two defendants filed separate appeals.

The prosecution presented two witnesses at trial. Officer John Kalavsky was the prosecution's first witness. Officer Kalavsky testified on July 7, 1984 he responded to a complaint a robbery had occurred near the Taste Of Honey Lounge. When he arrived on the scene another officer had already apprehended the two suspects, Thornton Davis and Frederick Seals, about a half

mile to three quarters of a mile from the robbery. Consequently, Kalavsky went to speak with the complainant, Mr. Willie Presley. Officer Kalavsky testified Mr. Presley was in an extremely excited state when he arrived. Kalavsky testified Presley then relayed the following account of the robbery to him. Presley went to the Taste of Honey Lounge for a drink. He had a drink with his acquaintance, Mr. Seals. Another man later identified as Mr. Davis, who appeared to be Seals' acquaintance, joined them at the bar. The three men had a casual conversation. Presley left the bar after a short time with the merchandise in his possession which he had purchased earlier in the day. As he walked eastward Davis and Seals approached him. Davis struck Presley with his fist and knocked him to the ground scattering Presley's merchandise on the pavement. Davis and Seals took Presley's property and departed in a white four-door automobile. Presley made a partial identification of the license plates, viz., number QKD plus two numbers. Presley told Kalavsky cash was also taken from him.

Kalavsky took Presley to the location at which the arresting officer had Davis and Seals in custody. Presley identified both men as the individuals who had robbed him as well as their vehicle and the stolen merchandise.

Officer Kalavsky testified Davis was sober; however, Seals was highly intoxicated, as was evidenced by his slurred and mushmouth type voice, bloodshot eyes, lack of coordination and the strong odor of alcohol. Kalavsky stated there was alcohol on Presley's breath but Presley was not physically nor mentally impaired.

Mr. Willie Presley was the state's second witness. Presley testified as follows: On Saturday, July 7, 1984 he picked up his pay check, cashed it, paid his rent and proceeded to various stores to purchase merchandise such as record albums and a clock. Then Presley stopped at Taste of Honey Bar for a beer. Seals, an acquaintance of Presley's from the bar, was seated at the bar two stools away from him. There was another man sitting on the other side of Seals who was later identified as Davis, a friend of Seals. Seals introduced Presley to

his friend Davis. The three men then engaged in conversation and Presley bought Davis and Seals beers. Presley testified Davis and Seals left the bar after approximately twenty minutes. As they departed they spoke to each other in a low whisper.

When Presley left the Taste of Honey Lounge ten minutes later, Davis and Seals were standing outside in the front of the bar still engaged in conversation. Davis approached Presley to ask Presley to loan him Ten Dollars ($10). Presley responded he did not have the Ten Dollars ($10) but Davis continued to ask him for the money. Presley testified Davis "hit my pocket and hit me all at the same time" and then Presley went down, his money, clock and record albums scattering on the ground. Presley testified Davis had gone in his pocket. Seals stood there and looked. Presely asked Seals to help him but Seals did nothing. Other people passed by but nobody stopped to help Presley. Presley saw Davis take the money, then he observed Davis and Seals get into a vehicle he believed to be Seals' car with his, Presley's, clock and record albums.

Presley then went to find a telephone to call the police. First he returned to the bar but the telephone was being used by somebody else. Next, he went to the store next door to the bar but that telephone was out-of-order. Presley returned to the Taste of Honey Lounge and the phone was still in use. As Presley left the bar and walked towards his apartment, Davis got out of the car, approached Presley and threatened him. Presley testified he was in fear of his life. Presley proceeded to his apartment and called the police.

Frederick Seals was the sole witness for the defense. He gave the following testimony at trial. Seals had met Presley at the Taste of Honey Lounge about two months prior to this incident. They exchanged telephone numbers and Presley phoned Seals at home very late on the night they met. The two men had a disagreement on the phone and Seals did not want to get together with Presley.

On July 7, 1984 Seals stopped at the bar for a drink in the early part of the day; he went home where he drank a quart of beer and he returned to the bar later in the day. Presley came into the bar,

they talked and Seals and Presley left the bar to drive over to the house of a friend of Seals. When the friend was not home Seals and Presley returned to the Taste of Honey Lounge. They were sitting on stools next to each other. Davis entered and stood between Seals and Presley. Davis bought himself a beer and then sat on the other side of Seals. Davis asked Seals to take him to the barber. Seals and Davis left the bar and Presley followed them. Presley put his hand on Seals' shoulder and wanted to talk to him. Seals and Presley began wrestling and Davis broke up the fight.

Seals testified he was in an extremely intoxicated condition on the day in question. He did not see Davis' hand in Presley's pocket or the money strewn on the pavement. After Davis ended the fight, Davis and Seals went to Seals' car. Although he was extremely intoxicated and had no recollection of selected events which occurred that day, Seals drove the car.

I.

Appellant's first assignment of error provides as follows:

THE COURT ERRED IN THE ADMISSION OF CONSIDERABLE TESTIMONY IN VIOLATION OF THE APPELLANT'S RIGHT OF CONFRONTATION AND THE HEARSAY RULE.

Appellant's first assignment of error is not well taken.

Evid. R. 801 (C) defines hearsay as follows:

> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial of hearing, offered in evidence to prove the truth of the matter asserted."

Appellant objects to the admission of Officer Kalavsky's testimony concerning Willie Presley's account of the robbery as told to Kalavsky when he arrived on the scene to investigate the incident. Appellant's contention is correct to the extent Officer Kalavsky's narrative constituted hearsay. Officer Kalavsky' testimony falls squarely within the above definition of hearsay: the statement was made by an individual not Kalavsky, viz., Willie Presley, who was not the declarant, and it was offered to prove the truth of the matter asserted, i.e.,

appellant and Davis robbed Presley.

However, the admission of this testimony was not prejudicial. The purpose behind the hearsay rule is to exclude hearsay evidence which by its nature is unreliable and is not subject to cross-examination. Covington v. Sawyer (1983), 9 Ohio App. 3d 40; State v. Waite (1984), 13 Ohio App. 3d 379; Mikula v. Balogh (1965), 9 Ohio App. 2d 250. In the case sub judice, these infirmities, against which the hearsay rule is designed to protect, are not present. Appellant had the opportunity to confront and cross-examine Presley as well as Officer Kalavsky. Thus, appellant had the opportunity to determine if there were any discrepancies between Presley's account to Officer Kalavsky and Presley's testimony at trial. If it was error for the trial court to permit the introduction of this hearsay evidence at trial, it was harmless error beyond a reasonable doubt.

For these reasons, appellant's first assignment or error is overruled.

II.

Appellant's second assignment of error is as follows:

THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND IS CONTRARY TO LAW.

Appellant's second assignment of error is without merit.

> "A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." State v. Eley (1978), 56 Ohio St. 2d 169.

The victim, Willie Presley, testified appellant exerted force against him, knocked him down and put his hand in Presley's pocket scattering Presley's money and possessions on the ground. Then appellant took Presley's possessions; his records, his clock and cash and fled the scene. Kalavsky also stated Presley identified appellant as the man who forced him to the ground and took his merchandise. The record indicates Presley's possessions were found in the car Seals and appellant were driving when they were apprehended. Since there was sufficient evidence from which the jury could reasonably conclude

appellant robbed Presley in violation of R.C. 2911.02, this court will not reverse appellant's conviction as being against the manifest weight of the evidence and contrary to law.

Appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARKUS, P.J., and

PRYATEL, J. CONCUR.

_____

Judge
BLANCHE KRUPANSKY

N.B. This entry is made pursuant to the third sentence of Rule 22 (D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Then (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

(2)

Supreme Court, U.S.
FILED
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1808

In the Supreme Court of the United States

October Term, 1985

THORNTON DAVIS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Whether due process is violated when hearsay evidence is admitted pursuant to exceptions noted at law when, if error, it is harmless beyond a reasonable doubt.

2. Whether the verdict, supported by testimony as to each material element of the charge, was as a matter of law, against the manifest weight of the evidence.

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TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and in the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, unanimously affirmed the convictions. Likewise, the Supreme Court of Ohio overruled Petitioner's motion for leave to

appeal and dismissed sua sponte for the reasons that no substantial constitutional questions exist therein.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

On August 21, 1984, Petitioner was indicted, along with Frederick Seals, in Case No. CR 192325 for Robbery, in violation of Ohio Revised Code, Section 2911.02. The Petitioner was also charged with two specifications for previous aggravated felony convictions, to-wit: Robbery in Case No. CR 167418 on December 23, 1981 and Aggravated Burglary in Case No. CR 162143 on January 15, 1982, in violation of Ohio Revised Code, Sections 2911.02 and 2911.11, respectively.

On November 8, 1984, the Petitioner and Frederick Seals were found guilty after a jury trial of Robbery. The specifications had been previously stipulated to by trial counsel.

Petitioner filed a timely appeal to the Court of Appeals, Eighth Judicial District, which was denied on October 31, 1985. Mr. Seals also filed a timely appeal which was subsequently denied as to the substantive background of the case but was reversed and remanded for proper sentencing in accordance with the law.

On March 5, 1986, the Ohio Supreme Court overruled Petitioner's motion for leave to appeal and dismissed the appeal sua sponte.

STATEMENT OF THE FACTS

On July 7, 1984, at about 4:30 p.m., Willie Presley went to the Taste of Honey Lounge in Warrensville Heights, Cuyahoga County, Ohio. While there, he met an acquaintance, Frederick Seals, that he had met once previously and stopped to chat with him. Frederick Seals introduced him to Thornton Davis, who had come up to sit next to them at the bar.

After about twenty minutes, Petitioner and Seals left the bar, whispering as they left. Presley left about ten minutes later and saw both men waiting outside the bar. Appellant then approached Presley and asked for some money, a loan. Presley said no, at which time Petitioner struck Presley at his pocket and pushed him down. Doing this, the money Presley was carrying fell to the ground. Petitioner picked up this money as Presley crept away and into the bar. When Presley returned, Petitioner Seals and the packages Presley had been carrying were gone. Presley observed both Seals and Petitioner in Seals' car and Petitioner came back and threatened him at that time.

Shortly thereafter, Warrensville Heights Police approached a stopped car which matched the description that had been broadcast in response to Presley's call to the police. John Kalavsky responded to speak with Presley while two other officers held Petitioner and Seals at Seals' car. While talking to Presley, Kalavsky received a detailed description of what happened and, in particular, what was stolen. When they returned to Seals' car, all the items described were found in the car.

Seals testified that he had met Presley earlier that day and drove him to visit a photographer friend, not

known to Presley, who wasn't home. He and Presley stopped at a carry-out store and got some more beer and eventually returned to the bar.

He stated that during the course of the day, he'd had about twelve to thirteen beers between 8:00 a.m. and 5:00 p.m., and that he was very drunk. He remembered that shortly after leaving the bar with Petitioner, Presley came out and put his hand on his shoulder, an act he found offensive. He stated that he and Presley began to scuffle and Petitioner stepped between them and pushed them apart (R. 143). After that, he stated that Petitioner wanted to go to the barbershop, that they got into his car with Seals driving and left. He didn't remember anything else until being stopped by the police (R. 144).

REASONS FOR DENYING THE WRIT

1. Due Process is not violated when hearsay evidence is properly admitted pursuant to exceptions noted at law and when, if error, it is harmless beyond a reasonable doubt.

The objected to evidence was properly admitted pursuant to Ohio Rules of Evidence 801 (D) (1) (C) as though it was not hearsay. It was also properly admitted under the theory expressed in *United States v. Elemay* (9th Cir., 1981), 656 F.2d 507, and *State v. Lancaster* (1971), 25 Ohio St. 2d 88. "Prior identification of the accused may be shown by the testimony of a third person to whom, or in whose presence the identification was made, if the identifier also testifies."

It was also acceptable testimony under the "excited utterance" exception to hearsay set forth under Ohio Rules of Evidence 803 (2).

Finally, as the Court of Appeals, Eighth Judicial District, pointed out, there was no denial of confrontation. Petitioner had the opportunity to cross-examine Presley, the declarant, as well as Officer Kalavsky. The Court of Appeals also did not state, as Petitioner alleges, that it was clearly error, merely that it was non-prejudicial. Further, the Court ruled that the evidence was not by its nature unreliable or not subject to cross-examination.

2. The verdict, supported by testimony as to each material element of the charge was not as a matter of law, against the manifest weight of the evidence.

Petitioner asks for a review of the evidence presented in this case. A perusal of the testimony will establish that it is neither contradictory nor lacking in the establishment of any element.

Petitioner argues that the reviewing court should substitute its opinion for that of the trier of fact, the jury, when determining the credibility of a witness. Such a substitution is expressly forbidden. *State v. DeHass* (1967), 10 Ohio St. 2d 230.

Further, the record is devoid of any mention of renewal of the Motion for Acquittal pursuant to Criminal Rule 29. The law is well established that an accused waives his right to a directed verdict of acquittal at the close of the State's case by thereafter introducing evidence and failing to renew the motion at the close of all the evidence. *State v. DeBoe* (1977), 62 Ohio App. 2d 102; *State v. Hairston* (1977), 60 Ohio App. 2d 220.

CONCLUSION

In conclusion, the Respondent, State of Ohio, submits that the Petition herein fails to represent any question of constitutional dimension justifying review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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